IN THE COURT OF APPEALS OF IOWA

No. 7-618 / 07-0161
Filed November 29, 2007

IMT INSURANCE, RON D. SMITH and MYONG S. SMITH,
Plaintiffs-Appellants,

vs.

WEST BEND MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Plaintiff landlords and their insurer appeal from district court's adverse ruling on summary judgment. **REVERSED AND REMANDED.**

William Larson and Brian L. Yung of Klass Law Firm, L.L.P., Sioux City, for appellant.

Michael A. Carmoney of Grefe & Sidney, P.L.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Miller and Baker, JJ.

BAKER, J.

In this appeal, we are asked to decide whether a tenant's insurer has a duty to defend the landlord in a negligence action where the landlord is named as an additional insured under the tenant's liability policy, which limits liability to incidents arising out of the ownership, maintenance, or use of the leased premises. We conclude the district court erred in granting the insurer's motion for summary judgment because the injuries appear to have arisen from the operation and use of the leased premises, and because potential liability exists for the club based on the specifications of negligence in the petition.

I. Background and Facts

On January 12, 2004, Martha Doyle slipped and fell on an ice-covered sidewalk as she was entering Club Fitness, a gym located in Fort Dodge. The sidewalk was located between the parking lot and entrance to the club. Doyle and her husband filed a lawsuit against Club Fitness and Ron and Myong Smith, the building owners, alleging the sidewalk was slippery due to an accumulation of ice.

The Smiths lease a portion of the building in which Club Fitness is located to Dave Pearson and William Shirbroun, who operate the club. Pursuant to the lease between the Smiths and Club Fitness, the Smiths leased to the club the building space "and the joint use of the parking facilities . . . and all rights, easements and appurtenances thereto belonging." The Smiths were responsible for maintenance of the parking lot, roof, and gutter system. The lease also provided that Club Fitness was to pay the Smiths for a portion of the snow

removal for the parking lot and adjoining sidewalks under which they would contract for snow removal. The lease does not otherwise mention the sidewalk.

The Smiths carried general commercial liability insurance coverage with IMT Insurance Company. Ron Smith was also named as an additional insured under the club's liability policy with West Bend Mutual Insurance Company. Pursuant to the insurance policy between Club Fitness and West Bend, Smith was insured "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to" the club.

Following service of the Doyles' lawsuit, the Smiths made a timely claim with IMT, who undertook their legal defense pursuant to the terms of the policy. Club Fitness notified West Bend, who provided the club with legal defense. While the Doyles' action was pending, IMT issued a formal tender to West Bend, requesting West Bend defend and indemnify the Smiths. West Bend denied the tender of defense because Smith was an additional insured "only with respect to liability arising out of . . . the premises leased to" the club. According to West Bend, because the lease did not include the sidewalk as part of the leased premises, and "the liability sought to be imposed upon Mr. Smith does not arise out of the leased premises to Club Fitness," the lawsuit was beyond the coverage provided by West Bend.

IMT and Smith filed a declaratory judgment action to determine the rights and responsibilities of the parties relating to insurance coverage and the duty to defend. IMT filed a motion for summary judgment, and West Bend filed a resistance and cross-motion for summary judgment. On January 11, 2007, the district court issued an order denying IMT's motion and sustaining West Bend's

motion for summary judgment, finding West Bend had no obligation to indemnify or duty to defend the Smiths. The Smiths and IMT appeal only that portion of the court's order concerning West Bend's duty to defend.

II. Merits

We review the interpretation of the language of an insurance policy for correction of errors at law. *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27 (Iowa 2005). We also review a ruling on a motion for summary judgment for correction of errors at law. *Id.* Summary judgment is proper only where, viewing the evidence in the light most favorable to the nonmoving party, the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.*

In resolving duty to defend issues, we look to the insurance policy, the pleadings filed in the underlying lawsuit, and any other admissible and relevant facts in the record. *McAndrews v. Farm Bureau Mut. Ins. Co*., 349 N.W.2d 117, 119 (Iowa 1984). If after construing both the policy in question, and the pleadings and facts, it appears the claim is not covered by the insurance contract, the insurer has no duty to defend. *Id.*

The insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. *Essex Ins. Co. v. Fieldhouse, Inc.*, 506 N.W.2d 772, 775 (Iowa 1993). The duty arises

> whenever there is potential or possible liability to indemnify the insured based on the *facts* appearing at the outset of the case. In other words, *the duty to defend* rests *solely* on whether the petition contains any allegations that *arguably* or *potentially* bring the action within the policy coverage. If any claim alleged against the insured can rationally be said to fall within such coverage, the insurer must defend the entire action. In case of doubt as to whether the petition

> alleges a claim that is covered by the policy, the doubt is resolved in favor of the insured.

Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639, 641 (Iowa 1996) (internal citations and quotations omitted).

A. The Policy

We first consider the insurance policy to determine whether there is a duty to defend. *McAndrews*, 349 N.W.2d at 119. The insurance policy between Club Fitness and West Bend named Smith as an additional insured "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to" the club. The propriety of granting summary judgment to West Bend, therefore, depends on whether Doyle's injury arose out of the "ownership, maintenance or use" of those premises leased to the club. *See Md. Cas. Co. v. Chicago and Nw. Transp. Co.*, 466 N.E.2d 1091, 1094 (Ill. App. Ct. 1984); *see also Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395, 407 (Iowa 2005) ("Insurance policies are contracts between the insurer and the insured and must be interpreted like other contracts, the objects being to ascertain the intent of the parties.").

The phrase "arising out of the ownership, maintenance or use" of the leased premises is not defined in the insurance policy. "When words are not defined in the policy, we give them their ordinary meaning." *Kalell v. Mut. Fire & Auto. Ins. Co.*, 471 N.W.2d 865, 867 (Iowa 1991). We understand "arising out of . . . to mean originating from, growing out of, or flowing from, and require only that there be some causal relationship between injury and risk for which coverage is provided." *Id.* (citations omitted).

West Bend asserts that the incident must occur on the actual premises leased to the tenant in order to trigger coverage. *See, e.g., U.S. Fid. & Guar. v. Drazic*, 877 S.W.2d 140, 142-43 (Mo. Ct. App. 1994) (holding landlord was not covered as additional insured under policy, which limited coverage "to liability arising out of the ownership, maintenance or use of" the leased property because such coverage "applies only after an act by the tenant causes injury on the actual premises leased to the tenant for which the landlord can be held vicariously liable"). IMT argues for a "substantial nexus" test. At least one court has determined that a duty to defend exists if there was a "substantial nexus between the occurrence and the use of the leased premises." *Franklin Mut. Ins. Co. v. Sec. Indem. Ins. Co.*, 646 A.2d 443, 446 (N.J. 1994). While Iowa has not directly addressed this issue, our Supreme Court refused to apply the *Franklin* holding where an additional insured endorsement limited coverage to "designated premises being insured by this policy, which are directly connected," because of "substantial differences" in the language in that endorsement and the "arising out of" language found in the *Franklin* policy. *City of Cedar Rapids v. Ins. Co. of N. Am.*, 562 N.W.2d 156, 158 (Iowa 1997). In this case, however, it is unnecessary to determine which test applies. Under either test, we find that a potential for liability exists.

Doyle was walking into Club Fitness from the parking lot when she fell on the sidewalk between the parking lot and the club's entrance. If we construe the policy liberally in favor of the Smiths, Doyle's injuries "appear to have arisen from the operation and use of the leased premises, since they would not have been sustained 'but for'" her plan to enter the club. *Md. Cas. Co.*, 466 N.E.2d at 1094

(holding victim's presence on premises "was not a fortuitous happenstance, but a regular and foreseeable occurrence," and the insurance "policy, therefore, reasonably must be construed to cover any risks attendant upon" the victim's presence); *see also Kalell*, 471 N.W.2d at 867 ("If an insurance policy provision is ambiguous, we construe it in the light most favorable to the insured.").

An issue further exists as to whether the sidewalk is part of the leased premises. The lease provides that "appurtenances" are included. Although an open question, the sidewalk may be deemed to be an appurtenance. *See State v. Pace*, 602 N.W.2d 764, 770 (Iowa 1999) (noting an adjoining sidewalk is an appurtenance to a house). We hold, therefore, that the district court erred in granting summary judgment to West Bend because Doyle's injury potentially arose out of the premises leased to the club.

B. The Petition

The district court also concluded that West Bend has no obligation to defend or indemnify the Smiths with regard to the Doyles' lawsuit because (1) the Doyles' allegation of negligence in piling melting snow from the parking lot against the northeastern corner of the building was insufficient to trigger coverage under West Bend's additional insured endorsement, and (2) the sidewalk was not part of the lease agreement. IMT argues the district court did not engage in the proper analysis in coming to that conclusion, and the court should have reviewed the contents of the lawsuit "to determine whether there was potential or possible liability to indemnify Smith based on the facts appearing at the outset of the case." West Bend similarly asserts that the "real issue in this

case is whether the Doyles' lawsuit included any claims against Ron and Myong Smith which were potentially covered under the West Bend policy."

To determine whether the insurer has a duty to defend, we look to the petition for the facts of the case. *First Newton Nat'l Bank v. Gen. Cas. Co. of Wis.*, 426 N.W.2d 618, 623 (Iowa 1988); *see also Essex*, 506 N.W.2d at 775 (1993) (noting the allegations contained in the petition are the starting point in analyzing an insurer's potential duty to defend). "When necessary we expand our scope of inquiry to any other admissible and relevant facts in the record." *Id.*

According to the Doyles' petition, the defendants were negligent:

> a. In constructing the downspouts so that they caused water to flow onto the sidewalk resulting in the water freezing to ice;
> b. In failing to repair said sidewalk so that water would not pool on it resulting in the water freezing and creating a sheet of ice;
> c. In piling snow immediately adjacent to the defective sidewalk resulting in the snow melting and pooling on the sidewalk;
> d. In failing to timely and adequately remove the ice from the sidewalk . . . ;
> e. In failing to remove ice from the sidewalk within 24 hours of the ice formation contrary to Fort Dodge Municipal Ordinance 12.40.012;
> f. In failing to remove ice from the sidewalk within a reasonable amount of time contrary to I.C.A. § 364.12(2)(b);
> g. In failing to timely and adequately sand or chemically treat the ice on the sidewalk in front of the building . . . ;
> h. In failing to warn the plaintiff, Martha Doyle, of the danger created by the ice covered and slippery sidewalk; and
> i. In failing to act as a reasonable person under the conditions then and there existing.

Smith and IMT contend that Smith is entitled to a defense from West Bend based upon the allegations in the Doyles' petition because, "if even the possibility of coverage existed under the policy for these allegations, West Bend was obligated to undertake a defense of Smith." They also contend that Smith is

entitled to a defense from West Bend because "there was at least a factual dispute" relating to whether the sidewalk was covered by the lease.

"[A] possessor of land is subject to liability to its invitees if its premises are not in a reasonably safe condition whether the possessor maintained the premises itself or hired an independent contractor to do so." *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 704 (Iowa 1995). Under *Kragel*, the duty to maintain the premises is nondelegable. Therefore, Club Fitness cannot absolve itself of liability by contracting with either the Smiths or a subcontractor for the snow removal if it had responsibility for the sidewalks. Because Club Fitness was responsible for a portion of the costs of snow removal, and because the issue of who was the possessor of the sidewalk is still an open question, potential liability exists for Club Fitness under the portion of the policy regarding "arising out of the . . . maintenance" of the leased premises.

West Bend has failed to establish the absence of any possible basis on which it could be obligated to indemnify the Smiths against liability for Doyle's injuries. Therefore, based upon the specifications of negligence in the Doyles' petition, the possibility of coverage for the Smiths as an additional insured exists under the policy, and West Bend has a duty to defend. *See Petito v. Beaver Concrete Breaking Co., Inc.*, 613 N.Y.S.2d 523, 527 (N.Y. Civ. Ct. 1994) (holding insurer obligated to defend additional insured where insurer "failed to establish that there is no possible factual or legal basis on which they might eventually be obligated to indemnify [additional insured] against liability"); *see also First Newton Nat'l Bank*, 426 N.W.2d at 629 (holding insurer has a duty to defend because insured has potential liability under the policy). We do not, however,

decide which carrier is primary or whether West Bend has a duty to indemnify IMT for any loss in connection with the lawsuit.

III. Conclusion

We hold that, with regard to West Bend's duty to defend the Smiths only, the district court erred in denying IMT and the Smiths' motion for summary judgment and in granting summary judgment in favor of West Bend. Accordingly, we reverse the district court's ruling granting West Bend's motion and remand to the district court for entry of summary judgment in favor of IMT and the Smiths on that issue.

REVERSED AND REMANDED.